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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

In re Marriage of JENNIFER L. POSTLEY and HOWARD J. POSTLEY.	B215540 (Los Angeles County Super. Ct. No. SD019022)
HOWARD J. POSTLEY, Appellant, v. JENNIFER L. POSTLEY, Respondent.	

APPEAL from a judgment of the Superior Court of Los Angeles County. John A. Kronstadt, Judge. Affirmed.

Trope and DeCarolis, Patrick DeCarolis, Jr. and Cynthia K. Arce for Appellant.

No appearance for Respondent.

Howard Postley appeals the family law court's order denying his motion seeking to enforce an alleged 2003 agreement with his ex-wife respondent, Jennifer Postley, to modify and reduce child and spousal support appellant was obliged to pay under the marital settlement incorporated into the judgment of dissolution. The lower court found that appellant had failed to carry his burden to prove that an agreement to modify support existed and that he had further failed to demonstrate his entitlement to equitable relief. Before this court, appellant contends the court erred in failing to find that the parties orally agreed to reduce appellant's spousal and child support obligations. In the alternative, he argues the family law court should have granted him equitable relief based on waiver, estoppel and/or accord and satisfaction because respondent had accepted the reduced support payments for four years without complaint. As we shall explain, based on the evidence before this court, we conclude that sufficient evidence supported the court's resolution, and appellant has failed to demonstrate error. Consequently we affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Appellant and respondent married in September 1990. The couple have two children, Colin Postley born in 1993 and Tristan Postley born in 1995.

Appellant filed for dissolution of the marriage on July 11, 2001.[1] At the time appellant filed for divorce he was an executive at Price Waterhouse Coopers earning approximately $185,000 a year. He also had a second temporary job; and working the two jobs he earned $235,000. Respondent did not work outside of the home.

On March 5, 2002, a judgment of dissolution of marriage was entered which resolved all of the issues between them. Appellant and respondent entered into a stipulated judgment to divide the property, assets, and liabilities as well as determine custody arrangements and establish support. Pursuant to the judgment, appellant was ordered to pay $2,897 per month in spousal support, and $3,103 per month in child support, for a total of $6,000 a month. The dissolution order further indicated that the

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[1] Respondent and appellant represented themselves in the dissolution proceedings.

monthly child support payment would continue every month "until further order of this court" or until the minors married, died or reached the age of 18 and graduated from high school. The judgment further stated that the court would retain jurisdiction to make orders to carry out the agreement.

In August 2002, appellant was laid off from his job at Price Waterhouse Coopers. Appellant claims that he contacted respondent in the fall of 2002 and informed her that he could not afford to pay the amount of monthly support ordered in the judgment because he had lost his job. Appellant started a new company and anticipated that his new yearly salary would be approximately $125,000 a year. Based on this reduced salary appellant claimed that he calculated[2] that he could pay total support (both spousal and child) payments of $3,500.[3]

According to appellant, in the fall of 2002, respondent orally agreed to accept the reduced support and appellant completed the appropriate court forms to obtain a court-ordered modification of the support. Appellant claims that he signed the forms and that respondent also signed the forms. Before he filed the documents, appellant discovered that the family law court forms had been revised, and therefore he had to complete them again. He claims that once again he signed the documents and respondent signed them as well. Appellant stated that he took them to the court and gave them to a court clerk for filing. However, unbeknownst to appellant the court rejected the documents and returned them to respondent.

In the lower court, respondent refuted appellant's version of events.[4] Respondent claimed that she and appellant began negotiations to reduce support payments in early

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[2] Appellant stated that he used Cal Support software to determine the appropriate support levels.

[3] Under the purported agreement the child support was reduced to $2,295 per month and the spousal support was reduced to $1,205 a month.

2003. In February and March 2003, appellant and respondent exchanged a number of e-mails concerning modification of appellant's support obligations and visitation issues. The e-mails indicate that appellant sought to reduce the amount of support to approximately $3,600 a month, but appellant and respondent had not reached a final agreement on the exact number. From late February through March 19, 2003, appellant's and respondent's e-mails reflect a dispute about a number of issues including which of them could claim the children as deductions on their individual tax returns.

In March of 2003, appellant claims he completed new court forms to obtain a stipulated modification of support. Appellant presented a "stipulation to modify child support," dated March 9, 2003, which he states contains his signature and the signature of respondent.[5] Appellant never filed this form with the court nor did he obtain a court order to modify the judgment.

In April 2003, respondent retained an attorney to prepare a stipulated modification of the judgment. Her counsel worked on the matter in April; and in May 2003 prepared a draft of the proposed modification. The draft modification indicated that appellant would pay spousal support in the amount of $1,113 per month and arrearages of $500 a month for seven months; and child support in the amount of $2,295 of month. Appellant paid respondent's lawyer $300 to defray a portion of the costs of preparing the modification. Respondent's correspondence to her counsel indicated that appellant would file the stipulation with the court once it was final. However, the proposed modification was never finalized or filed in the court. In fact, according to respondent no "deal" to modify

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[4] Respondent has not filed a responsive brief or otherwise appeared in this court. Under rule 8.220(a)(2) of the California Rules of Court, we shall "decide the appeal on the record, the opening brief, and any oral argument by the appellant." "Although some courts have treated the failure to file a respondent's brief as in effect a consent to a reversal, it has been said that the 'better rule . . . is to examine the record on the basis of appellant's brief and to reverse only if prejudicial error is found.' [Citations.]" (*In re Bryce C.* (1995) 12 Cal.4th 226, 232-233.)

[5] Respondent denied signing this document; respondent believes that appellant did "something to place her name on the document."

the spousal support was ever finalized; she stated that she never agreed in writing or orally to allow appellant to reduce the support because they could never agree on the exact terms.

Notwithstanding the foregoing, in February 2003, appellant began paying respondent a total of $3,500 a month in support. Appellant also claims that for 11 months beginning the summer of 2003, appellant paid respondent an additional $500 of support based on the calculations made by respondent's attorney.[6]

Respondent acknowledged that appellant paid the reduced $3,500 a month in spousal and child support beginning in early 2003, but testified that she never actually agreed to the reduced amount. Respondent testified that she periodically discussed the matter with appellant and told him that she believed according to the original judgment that any modification had to be approved by the court, that they could not modify the judgment on their own, that it had to be done "officially" and "legally;" and that she believed that appellant had not completed the proper process to modify the judgment. She further stated that although she felt she was receiving less support than she was entitled to under the original judgment and realized that she should have returned to court to address the issue, she could not go through the emotional turmoil of going to court to resolve it.

In July 2007, appellant commenced support enforcement proceedings with the Child Support Services Department (CSSD), for the under payment of support ordered in the original judgment.

In December 2007, appellant filed a request for an OSC seeking to enforce the alleged agreement to modify and reduce child and spousal support; and to modify custody. Appellant's income and expense declaration filed in connection with the request for an OSC disclosed that in 2007 appellant was earning approximately $400,000 a year.

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[6] Respondent denied that she received the additional $500 a month.

In February 2008, the court dismissed the CSSD proceedings and the order to withhold income for child support was quashed.

In April 2008, the court held an evidentiary hearing on appellant's OSC. At the hearing the court indicated that it had two issues before it: First whether appellant and respondent had entered into a valid agreement to modify the support awards in the original judgment; and second, if no such agreement existed, "what is the effect of the respondent having received the lower amount for more than four years." The court indicated its view that appellant had the burden of proof as to the existence of an agreement to modify support. The court expressed a view that appellant had not carried his burden to prove that the parties had a valid agreement to modify the support obligations. The court noted that appellant had not demonstrated that a written agreement to modify spousal support existed and that the stipulation to modify child support was incomplete and had not been properly approved by the court. The court stated its opinion the parties had been in an "organic" on-going process to negotiate a reduction in support payments, but that the deal was never completed and thus they had no oral agreement to modify support. As to the effect of respondent waiting a number of years to complain about the reduced support payments, the court asked the parties to submit additional briefing on the issues of waiver, estoppel and laches.

At the subsequent hearing in June 2008, the court concluded that although it was troubled by the fact that respondent had waited a number of years to enforce the judgment, it was not persuaded that appellant was entitled to equitable relief under the theories of waiver, estoppel, laches or accord and satisfaction. The court noted that appellant did not properly follow-up or complete the process to modify the judgment. The court further observed that appellant had suffered no prejudice and that in fact in the intervening years his income had increased. The court also noted with respect to the child support, that respondent could not waive those rights.

Accordingly, the court discharged the OSC, denied appellant's motion to enforce the purported agreement to modify support was denied, and ordered appellant to pay support arrearages of $144,500 in principal and $43,000 in interest.

Appellant timely appeals.

DISCUSSION

Before this court appellant argues the court erred in failing to find the parties had agreed to reduce appellant's spousal and child support obligations. In the alternative, he argues the family law court should have granted him equitable relief based on waiver, estoppel and/or accord and satisfaction because respondent accepted the reduced support payments for four years without complaint. We address these issues in turn.

I. Substantial Evidence Supported The Court's Finding That The Parties Did Not Agree To Modify Appellant's Support Obligations.

Appellant asserts that the "weight of the evidence demonstrates an agreement" with respondent to modify and reduce spousal and child support beginning in the fall of 2002 from $6,000 a month to $3,500 a month. He asserts the lower court erred in finding that no such agreement existed.

Whether a contract exists is a question of law, subject to our independent review on appeal, only if the requisite facts are certain or undisputed. (*Bustamante v. Intuit, Inc.* (2006) 141 Cal.App.4th 199, 208.) Where, as here, the evidence is conflicting or gives rise to more than one inference, the existence of the contract is a question of fact for the trial court to determine, and we must uphold the determination if it is supported by substantial evidence. (*Id.* at p. 208; *Howard v. Owens Corning* (1999) 72 Cal.App.4th 621, 631.)

At the hearings on appellant's OSC the court discussed its findings and law as the basis for the judgment. We look to the transcript of those hearings and the documentary evidence in the record to determine whether the trial court's decision is supported by the facts and the law (*In re Marriage of Rising* (1999) 76 Cal.App.4th 472, 477, fn. 7) and apply the substantial evidence standard of review to both express and implied findings of fact. (*Ermoian v. Desert Hospital* (2007) 152 Cal.App.4th 475, 500-501.) Our power "'begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support'" the trial court's findings. (*Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559, 571, quoting *Crawford v.*

Southern Pac. Co. (1935) 3 Cal.2d 427, 429.) Evidence is "substantial" if it is of ponderable legal significance, reasonable, credible and of solid value. (*Howard v. Owens Corning*, *supra*, 72 Cal.App.4th at p. 631.) The testimony of a single witness can constitute substantial evidence sufficient to uphold a finding of the trial court. (*City and County of San Francisco v. Givens* (2000) 85 Cal.App.4th 51, 56.) Weighing the evidence and determining its credibility are within the sole province of the trier of fact. (*Howard v. Owens Corning*, *supra*, 72 Cal.App.4th at p. 630; *In re Casey D.* (1999) 70 Cal.App.4th 38, 52.) We must defer to the trial court's credibility determination and may reject evidence the court found credible only if its truth is a physical impossibility or its falsity is apparent without resorting to inferences or deductions. (*Evje v. City Title Ins. Co.* (1953) 120 Cal.App.2d 488, 492.)

The court in this case found that appellant had not carried his burden to prove that he and respondent had entered into a valid agreement to modify monthly spousal support or child support payments.

Turning first to the matter of spousal support, a party may enter into an agreement to reduce or waive future court-ordered support payments. (See *In re Marriage of Sabine and Toshio* (2007) 153 Cal.App.4th 1203, 1217.) Of course to be effective such a agreement must be the product of mutual assent. (*Banner Entertainment, Inc. v. Superior Court* (1998) 62 Cal.App .4th 348, 358-359 ["Mutual intent is determinative of contract formation because there is no contract unless the parties thereto assent, and they must assent to the same thing, in the same sense"].)

Here sufficient evidence in the record supported the court's conclusion that no agreement to modify support existed. Respondent testified that she never agreed to any reduction in support. She testified that although she and appellant attempted to negotiate a reduction, they never reached a final agreement and that even while accepting the reduced payments she discussed with appellant that they had not taken the proper legal steps to modify the support. The documentary evidence, including the unexecuted drafts of a proposed stipulation to modify support, underscores the court's finding. There is no evidence in the record before this court that the parties executed a written agreement to

modify spousal support, and respondent denies any oral agreement to do so. The e-mails between respondent and appellant in the winter and spring of 2003 disclose that they were trying to reach an agreement, but it had yet to be finalized. This evidence is sufficient to uphold the court's determination.

In contrast appellant points to evidence of his own testimony, various e-mails and the fact that respondent accepted the reduced payment for a number of years without objection to prove the existence of an agreement. The matters upon which appellant relies, even if credited, present at most a conflict in the evidence. However, in applying the substantial evidence standard, we resolve any conflicts in the evidence or reasonable inferences arising from the facts in support of the trial court's decision. (*In re Marriage of Ruelas* (2007) 154 Cal.App.4th 339, 342.)

We reach the same conclusion with respect to the purported agreement to modify the child support order. In the original stipulated judgment, the parties agreed that the court-ordered monthly child support payments would continue every month "until further order of this court." This language contemplates that any alteration of the child support would be subject to court approval. Indeed, public policy prohibits a parent from agreeing to limit a child's right to support. (*Kristine M. v David P.* (2006) 135 Cal.App.4th 783, 789.) As a result any reduction in the children's support required the review and approval of the court, irrespective of the language in the stipulated judgment. Although appellant presented the lower court with a written stipulation (which respondent denied signing) for a court order to modify child support, appellant concedes this document was never filed in the court. There is no evidence in the record of a valid and enforceable stipulation (or court order) to reduce child support.

Thus, sufficient evidence supports the lower court's conclusion as to this issue. In view of the applicable standard of review, we conclude appellant has failed to demonstrate the lower court erred in finding that the parties did not have a valid agreement to modify or reduce spousal or child support.

II. The Court Did Not Err In Refusing To Find Waiver, Estoppel And/Or Accord And Satisfaction.

Before this court, appellant argues that even if the trial court did not err in failing to find a valid agreement to modify the support, the court should have granted appellant relief from enforcement of the support ordered in the original marital settlement agreement under the theories of waiver, estoppel and/or accord and satisfaction. As we shall explain we find no error.

A. Waiver

"'Unless otherwise provided by law, any person may waive the advantage of a law intended for his [or her] benefit. (Civ. Code, § 3513.) Waiver is the voluntary relinquishment of a known right. [Citation.] To constitute a waiver, it is essential that there be an existing right, benefit, or advantage, a knowledge, actual or constructive, of its existence, and an actual intention to relinquish it or conduct so inconsistent with the intent to enforce the right in question as to induce a reasonable belief that it has been relinquished.'" (*In re Marriage of Paboojian* (1987) 189 Cal.App.3d 1434, 1437 (*Paboojian)*; quoting *Outboard Marine Corp. v. Superior Court* (1975) 52 Cal.App.3d 30, 41.) "The burden . . . is on the party claiming a waiver of a right to prove it by clear and convincing evidence that does not leave the matter to speculation, and "doubtful cases will be decided against a waiver" [citation].' [Citations.] The waiver may be either express, based on the words of the waiving party, or implied, based on conduct indicating an intent to relinquish the right. [Citation.]" (*Waller v. Truck Ins. Exchange, Inc.* (1995) 11 Cal.4th 1, 31.)

In the context of family law and specifically support orders, an order for child or spousal support, once entered is per se enforceable until paid in full and after support payments become due they *may not* be retroactively modified either as to accrued arrearages or any interest due. (See Fam. Code § 291, subd. (a); *In re Marriage of Hamer* (2000) 81 Cal.App.4th 712, 722 (*Hamer*); *In re Marriage of Sabine and Toshio, supra,* 153 Cal.App.4th at p. 1214.)

Nonetheless, a spouse has the ability—through words or conduct—to prospectively waive court-ordered spousal[7] support. (*In re Marriage of Sabine and Toshio, supra*, 153 Cal.App.4th at p. 1216.) *In re Marriage of Paboojian* is illustrative. In *Paboojian*, the trial court quashed a writ of execution as to amounts of spousal support provided by a December 1968 divorce decree that went unpaid until 1984, at which time the wife obtained a writ to collect arrearages for the preceding 10-year period. The husband testified that he had had serious financial trouble around the time of the divorce and had called his ex-wife in January 1969 and said, "'I can barely pay [child] support and you've got to agree I can't pay alimony.'" The husband further testified that his ex-wife said, "'Take care of the children and forget the alimony,'" but the wife denied ever making such a statement. The husband thereafter fully satisfied his child support obligations, and never made any spousal support payments. On this evidence, the trial court found that the wife "waived spousal support in the January 1969 telephone conversation and quashed the writ of execution." The court of appeal affirmed, reasoning that the wife had effectively waived future spousal support.[8] (*Paboojian*, *supra*, 189 Cal.App.3d at p. 1437.)

However, mere acquiescence in a lower payment than ordered in the original final dissolution judgment is not sufficient to constitute a waiver. (*Hamer, supra*, 81 Cal.App.4th at p. 721 [holding that a wife's acceptance of support payments in amounts less than ordered in the original judgment and a four-year delay in seeking to collect

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[7] Because child support is owed to the child and not to the spouse identified in the support order as the recipient of the payment, case law recognizes that a parent cannot waive or limit a child's right to child support without approval of the family law court. (See *Hamer, supra*, 81 Cal.App.4th at p. 720, fn. 7; *In re Marriage of Blazer* (2009) 176 Cal.App.4th 1438, 1446, fn. 3.)

[8] In reaching its conclusion the court in *Paboojian* relied on *Graham v. Graham* (1959) 174 Cal.App.2d 678, a case in which the court found waiver where the wife denied agreeing to accept reduced support and yet, accepted a reduced support payment without complaint for 11 years.

support amounts specified in the original judgment was not conduct so inconsistent with an intent to enforce her rights to support as to induce a reasonable belief that those rights had been relinquished].)

This court reviews the lower court's decision as to whether to find waiver in this context under the substantial evidence standard of review. (*In re Marriage of Sabine and Toshio, supra,* 153 Cal.App.4th at p. 1218.) "'[T]he power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted,' to support the trial court's findings. . . . 'We must therefore view the evidence in the light most favorable to the prevailing party, giving [her] the benefit of every reasonable inference and resolving all conflicts in [her] favor. . . .'" (*Estate of Leslie* (1984) 37 Cal.3d 186, 201, 207, citations omitted.)

Here the only uncontroverted evidence on this issue was that respondent waited for nearly four years to pursue a claim for the underpayment of support. However, neither lack of diligence nor lapse of time is sufficient to find waiver. (See *Hamer, supra,* 81 Cal.App.4th at p. 722.) Although, appellant testified that respondent had agreed to a reduced support payment, respondent denied that they ever reached a final agreement orally or in writing. She further testified that she discussed the matter with appellant periodically, and told him that they had not officially or legally modified the judgment. The lower court resolved this conflict in evidence in favor of respondent's version concerning the purported agreement and her intent. In sum, the court concluded appellant had failed to show respondent's conduct was "so inconsistent with the intent to enforce the right in question as to induce a reasonable belief that it [was] relinquished." (*Outboard Marine Corp. v. Superior Court* (1975) 52 Cal.App.3d 30, 41; P*acific Business Connection, Inc. v. St. Paul Surplus Lines Ins. Co.* (2007) 150 Cal.App.4th 517, 525.) "[D]oubtful cases will be decided against a waiver." (*Church v. Public Utilities Com.* (1958) 51 Cal.2d 399, 401; *Waller v. Truck Ins. Exchange, supra,* 11 Cal.4th at p. 31.)

While we have some sympathy for appellant's predicament, it is also the case that he knew how to seek a stipulation and obtain a court order to modify support and that he

was fully aware that he and respondent never completed the process to formally reduce the support by way of a written agreement or court order. Had appellant followed through to complete the stipulation or obtain a court order to reduce support, then this matter would not likely be here.

In short, given the standard of review, we cannot say that the court erred in refusing to find waiver.

B. Estoppel

Under his estoppel argument, appellant asserts that by accepting reduced payments for a number of years, respondent "represented" to appellant that they had an agreement (even though she believed they had no agreement), that he continued to pay the reduced amount in reliance on the agreement, which allowed him to avoid paying almost $150,000 in support and that he relied to his detriment because he now owes almost $50,000 more in interest.

The lower court rejected this theory, along with the related theory of laches,[9] because appellant failed to demonstrate prejudice. Below, appellant claimed his prejudice was that during the four years that he paid reduced support he had "gone on with his life." Like the trial court, however, we doubt that merely going on with one's life constitutes detriment. In fact, as the family court observed during the intervening years, appellant's salary almost doubled to nearly $400,000 a year, and he avoided paying the full amount of support ordered under the marital settlement agreement. Thus, even assuming the other elements of estoppel are met, the lower court properly rejected estoppel because appellant failed to carry his burden of demonstrating detriment.

C. Accord and Satisfaction

"The elements of an accord and satisfaction are: (1) a bona fide dispute between the parties, (2) the debtor sends a certain sum on the express condition that acceptance of it will constitute full payment, and (3) the creditor so understands the transaction and

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[9] Before this court, appellant does not claim that the lower court erred in rejecting his laches argument.

accepts the sum." (*In re Marriage of Thompson* (1996) 41 Cal.App.4th 1049, 1058.) "An accord and satisfaction may be implied. (*Thompson v. Williams* (1989) 211 Cal.App.3d 566. 571.) Whether a transaction constitutes an accord and satisfaction depends on the intention of the parties as determined from the surrounding circumstances, including the conduct and statements of the parties, and notations on the instrument itself." (*In re Marriage of Thompson*, *supra*, 41 Cal.App.4th at pp. 1058-1059, citing *Wallace v. Crawford* (1937) 21 Cal.App.2d 394, 404.)

Regardless of whether the dispute surrounding the division of proceeds was bona fide, here there is no evidence in the record that appellant communicated his intent that the $3,500 a month be an accord and satisfaction of total monthly support ordered under the judgment. Therefore, respondent could not have understood the transaction and accepted the sum. (*In re Marriage of Thompson*, *supra*, 41 Cal.App.4th at p. 1058; contra *Thompson v. Williams* (1989) 211 Cal.App.3d 566, 574 [parties "dickered" over amount due under agreement, payor offered partial payment saying, "take it or leave it," payee accepted the partial payment without objection, and the court found an accord and satisfaction].) Furthermore, there was no evidence of any other surrounding circumstances to demonstrate the parties' intent in this regard. In fact, respondent stated that she addressed the issue with appellant periodically and knew that the outstanding amounts he owed continued to add up every month. Accordingly, on this record, we find no evidence of an accord and satisfaction, and thus the family law court properly denied appellant relief under this the theory.

DISPOSITION

The judgment is affirmed. Appellant is to bear his costs on appeal.

WOODS, J.

We concur:

PERLUSS, P. J. **ZELON, J.**